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ARTICLE

# Socioeconomic rights in constitutional law: Explaining America away

Frank I. Michelman\*

*The apparent absence of a commitment to socioeconomic rights in United States constitutional law gives rise to continuing debate. It is unclear that this omission has any bearing on the actual performance of American governments in the social welfare field. Might there be other reasons for treating the omission as problematic? If so, might the omission nevertheless be explained in terms consistent with the belief that some kind of socioeconomic commitment ideally does belong in the constitutional law of a country like the U.S.? After briefly reviewing the uneasy instrumental case for a constitutionalized socioeconomic commitment, this article suggests why inclusion could be demanded, nonetheless, as a matter of political-moral principle. It then canvasses possible responses to the American case. These include both a possible denial that socioeconomic guarantees are, in fact, lacking from U.S. constitutional law and a possible claim that omitting them is the correct choice for the U.S. as a matter of nonideal political morality.*

Is the United States of America a welfare state? Does United States constitutional law contain any socioeconomic guarantees? Whichever way your snap answers go—maybe “no” and “no” for most readers—you can get an argument in response. It is clear why people care about the first question, less clear why anyone cares about the second, and, again, clear that many do care about the second. Cass Sunstein sees a need to explain why the American Constitution lacks what it lacks.<sup>1</sup> The “social rights” question begets books and more books, devoted not just to programmatic issues but, in at least equal measure, to questions of the prescriptive content of constitutional law that can make no difference for anyone’s life without concrete implementation from lawmakers and

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<sup>1</sup> See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 *SYR. L. REV.* 1 (2005) [hereinafter Sunstein, *American Constitution*]. See also Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 90 (Michael Ignatieff ed., Princeton Univ. Press 2005).

bureaucrats.<sup>2</sup> I have nagged at the constitutional law question over a span of forty years.<sup>3</sup> Why?

Below, I consider what reasons Americans today might have for favoring inclusion of socioeconomic guarantees in their constitutional law. I then turn to a consideration of how they might nevertheless conclude in favor of leaving the law in its current state, however exceptional in the world that state might prove to be.<sup>4</sup>

## 1. Terms and distinctions

### 1.1. Constitutive commitments

Here is the country's president, proclaiming a new chapter in its constitutional law:

... We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all... I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress to do so...<sup>5</sup>

Franklin D. Roosevelt listed guarantees respecting jobs, food and clothing, homes, medical care and health, education, and social security.<sup>6</sup> Seeing to these would be “the responsibility of the Congress,” pursuant to “a Second Bill of Rights.” That language evokes the Constitution and constitutional law, most certainly not by accident. We know the dénouement: in the years since FDR's declaration, the idea that U.S. constitutional law might harbor any sort of welfare-state mandate has been burnished by pundits,<sup>7</sup> put to the test, and

<sup>2</sup> See, e.g., *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* (Daphne Barak-Erez & Aeyal M. Gross eds., Hart 2007). Compare Sunstein, *American Constitution*, *supra* note 1 (“Political actors, even those interested in helping poor people, have been skeptical about the likely effectiveness of constitutional provisions that might be ignored in practice”).

<sup>3</sup> See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Foreword*]; Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, in *EXPLORING SOCIAL RIGHTS*, *supra* note 2, at 21.

<sup>4</sup> See Sunstein, *American Constitution*, *supra* note 1, at 3–4 (suggesting that this is, indeed, an instance of American exceptionalism).

<sup>5</sup> Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 40–42 (Samuel I. Rosenman ed., Random House 1950).

<sup>6</sup> See *id.*

<sup>7</sup> See, e.g., Michelman, *Foreword*, *supra* note 3; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 [hereinafter Michelman, *Welfare Rights*]. The academic interest continues. See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, STAN. L. REV. (2008).

decisively rejected.<sup>8</sup> Or so most well-informed lawyers would certainly report. Was FDR, then, a false prophet?

If he was, it is not because he envisioned developments in our constitutional law that have not, in fact, taken hold. Cass Sunstein surmises that only for want of a nail did a post–New Deal constitutionalization of the welfare state fail of consummation in this country. “Social and economic rights, American-style,” Sunstein speculates, could very possibly have become “a part of American constitutional understandings” if Hubert Humphrey had been elected President in 1968.<sup>9</sup> A series of decisions issuing from the Warren Court had seemed headed toward recognition of some sort of socioeconomic guarantee in our constitutional law,<sup>10</sup> and happenstance—Lyndon Johnson’s Vietnam quagmire leading to the election of Richard Nixon to the presidency, and then the occurrence of four Supreme Court vacancies on Nixon’s watch<sup>11</sup>—may be all that cut the development short. On that view of events, American constitutional socioeconomic rights may perhaps be deemed an accidental “casualty of an election that was fought out on other grounds.”<sup>12</sup>

None of that is what I mean by acquitting FDR of mistaking our constitutional law’s trajectory. I mean, rather, that constitutional law—or, at least, what we usually mean by constitutional law—never was FDR’s intended or predicted medium for the second bill. FDR’s guarded claim was that Americans had “accepted, so to speak,” an economic bill of rights. To put the matter that way seems more to point away from constitutional law than toward it, as the medium of acceptance.<sup>13</sup>

Toward what, then, did FDR point, if not toward constitutional law? Sunstein has the answer, in the form of what he has neatly dubbed the “constitutive commitments” of American society.<sup>14</sup> On Sunstein’s account, these are top-priority, popular canonical expectations for the conduct of American

<sup>8</sup> See *DeShaney v. Winnebago Cty Dept. of Soc. Serv.*, 489 U.S. 189 (1989); *Maher v. Roe*, 432 U.S. 464 (1972); *Harris v. McRae*, 448 U.S. 297 (1980); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>9</sup> See Sunstein, *American Constitution*, *supra* note 1, at 22.

<sup>10</sup> Sunstein here cites Michelman, *Foreword*, *supra* note 3.

<sup>11</sup> See Sunstein, *American Constitution*, *supra* note 1, at 20–23.

<sup>12</sup> *Id.* at 23.

<sup>13</sup> Might Bruce Ackerman be tempted to claim that Roosevelt’s “so to speak” was a harbinger of the theory of nonformal amendment and “constitutional moments” (see, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–267 (Harvard Univ. Press 1991))? I do not think so. As Sunstein points out, New Dealers, fresh from frustration at the hands of the Nine Old Men, were anything but keen to “increase the authority of judges” by putting the welfare state into constitutional law. See Sunstein, *American Constitution*, *supra* note 1, at 12, 14.

<sup>14</sup> CASS R. SUNSTEIN, *THE SECOND AMERICAN REVOLUTION: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62 (Basic Books 2004).

government. They are the stuff of public political sensibilities and debates, not of lawyers' constitutional law. Sunstein gives as examples the claims, in the United States today, to be free to join a union without risking your job, to be secure against racial discrimination by private employers, and to social security.<sup>15</sup> The public's expectations of government's recognition of these claims could have arisen, and could subside, without amendment of the Constitution; they exist, in Sunstein's account, alongside constitutional law, not inside it. By shortchanging these claims or by renegeing on the commitment to fashion laws and policies with a view to honoring them, Congress would not violate any law. Yet such conduct would, Sunstein maintains, be widely received as a comparably grave violation of the public trust, unless and until there had taken place in our country a mutation in "public judgments" on a scale for which a constitutional amendment would be a suitable form of expression.<sup>16</sup>

If Sunstein is right about the current content of American constitutive commitments, then perhaps FDR may be said to have prophesied truly our acceptance, "so to speak," of a second bill of rights. If Sunstein is wrong about that, FDR was correspondingly wrong about the impending course of American politics. Regarding the course of American constitutional law, however, I believe the president placed no bets. Whether Sunstein is right or wrong about welfare-state policies having made it onto the ledger of American constitutive commitments, it is fairly plain that they have not made it onto the ledger of American constitutional-legal guarantees. Let us, for now, take it as established that they have not. My first question about that is: Why should anyone care, any more than FDR probably did?

### 1.2. In constitutional law

Before proceeding, we should make sure we know what we are talking about, when we speak of getting socioeconomic rights into constitutional law. Questions can come up at any time about whether this or that scheme of state provision for people's material wants (Social Security, say, or food stamps) ought to be set in place, removed, or revised. Resolving such questions is not what we mean when we talk about getting socioeconomic rights into constitutional law. But what, then, do we mean, exactly? What sorts of question—beyond or distinct from those posed to policy makers by programmatic issues when they show up on parliamentary and bureaucratic agendas—do we take to be raised by talk of putting socioeconomic "rights" into "law" that is "constitutional"?

Undoubtedly, the term "socioeconomic rights" names a certain class of norms, meaning, by "norm," simply a guide to conduct that somehow, in some way, transcends the purely optional. Our question, for the moment, is what it

<sup>15</sup> See *id.*

<sup>16</sup> *Id.*

means for a norm to exist in (or as) constitutional law, and we may as well start with “law.” What does it mean for a norm to exist “in law”—as distinct, say, from “in morals” or “in social practice”? For purposes of the current inquiry, it seems we can best use an answer that holds open the vexed question of whether a norm can be said to exist in law regardless of expected judicial responses to ostensible deviations. Therefore, for now, I shall say, simply, that a norm exists in law—has been gotten into law—when a legal inquiry will identify it as one of those norms to which anyone who aims to be law-abiding should, for that very reason, normally feel a substantial if not decisive pressure to adhere. To get a norm into law is to produce a state of public affairs in which that sort of pressure can be expected to impinge on whoever is supposed to bear obligations attendant upon the norm. Conceiving of positive legality in such vague, watery, even circular, terms is, of course, jurisprudentially tendentious and maybe fatuous—a far cry from “[t]he prophecies of what the courts will do in fact and nothing more pretentious is what I mean by law.”<sup>17</sup> But please bear with me: there is a method in this madness.

Now, what about “constitutional” law? In my scheme of definitions, constitutional law is normative stuff that exerts the pressure of law on a country’s ordinary lawmakers—meaning by “ordinary lawmakers” whoever is in a position to decide the content of any and all of the country’s law that is not constitutional law.<sup>18</sup> Thus, to get a norm into constitutional law means to produce a condition in which the country’s ordinary lawmakers are brought under the sort of pressure for compliance that legal norms, in general, are expected to exert. Getting “socioeconomic rights” into constitutional law means garnering that sort of effect for the class of norms to which we give that name.

### 1.3. Socioeconomic rights

And what, then, would be this class? As a class, the norms called “socioeconomic rights” envision a desired set of social outcomes—roughly, that the rights holders at no time should lack access to levels deemed adequate of subsistence, housing, health care, education, and safety or to the means of obtaining the same (say, through available, remunerated work) for themselves and their dependents. Now, we speak here of “rights” and that term usually denotes a class of warranted demands, where the warrant may be legal, moral, or “social,” as the case may be. Socioeconomic rights in constitutional law thus would appear to be legally warranted claims to some line of conduct by the state and its functionaries—including, not least, ordinary lawmakers—by which the desired result will, in fact, be produced. Again, however, my aims are best served by a somewhat weaker conception. Let us speak, then, of legal

<sup>17</sup> O. W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

<sup>18</sup> Of course, that is not the only way to understand the idea of constitutional law—jurists in the United Kingdom have historically understood it quite differently—but it is the way that is germane to the aims of this paper.

obligations on lawmakers to make their best effort to devise, adopt, and execute policies and measures that will result in the desired social-outcome targets. Presumably, “best” efforts will be ones that take due account of certain other, perhaps circumstantially competing, principles (liberty, dignity, independence, self-respect, self-sufficiency, the rule of formally realizable law, general economic prosperity) that may appear in the same constitution’s order of values.

Such a best-efforts obligation—what I shall sometimes call a “socioeconomic commitment”—appears to be the sort of norm usually envisaged by talk of socioeconomic rights in constitutional law.<sup>19</sup> Interlocutors typically seem to have in mind something like the South African model: a declaration of everyone’s rights of access to adequate housing, food, water, health care services, and social security, coupled with a mandate to the state to take “reasonable legislative and other measures, within available resources, to achieve the progressive realization” of these rights.<sup>20</sup> Indeed, there is a plain reason why constitutionalized socioeconomic commitments are likely to assume such an open-ended form. How would you make them any more programmatically explicit, if you could, and hope to have them constitutionalized—entrenched in the country’s highest-ranking law—by any process possessed of a modicum of sincerity and prudence?<sup>21</sup>

## 2. Why care?

### 2.1. Instrumental reasons

Back, now, to our question. If, owing to failures on the part of American governments and legislatures, the “rights” in FDR’s proposed second bill go unfulfilled, then those failures are obviously something for latter-day New Dealers to deplore and seek to rectify. But is there any reason why our constitutional law’s indifference to such questions (if indifference it be) ought to trouble any American’s mind or conscience? New Dealers want American governments and legislatures to pursue devotedly the Rooseveltian vision, but why should

<sup>19</sup> See, e.g., SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* 42 (Princeton Univ. Press 2003) (observing that “the logic of positive constitutionalism...promises no more than or less than a good effort”).

<sup>20</sup> S. AFR. CONST. 1996, §§ 26, 27.

<sup>21</sup> A commentator on a prior version of this paper charged me with changing the subject from “socioeconomic rights” to mere “commitments” that are not true rights. I hope my exposition to this point makes sufficiently clear that there is no incontrovertible, conceptual barrier to positing a best-efforts commitment as the obligation correlative to a constitutional-legal, socioeconomic right. It is worth noting that the exposition, up to this point, circumvents debate about whether the political theory implicitly undergirding any socioeconomic rights, which might appear in one or another country’s constitutional law, is a “right-based,” “duty-based,” or “goal-based” theory, in the classification proposed by RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 171–173 (Harvard Univ. Press 1977). A right is still a right, regardless of which sort of background theory prompts its recognition.



they care what constitutional law has to say about it? In what way, if any, may U.S. constitutional law be thought the poorer or the worse for its failure to speak to the question of socioeconomic guarantees?

The most immediately inviting line of response to these questions is instrumental, in either a judge-centered or a popular-constitutionalist version. Either version (or any combination of the two) must respond to an obvious worry: Courts of law are widely viewed as ill-equipped to appraise state performance of a South Africa-style, best-efforts commitment—which, we have said, seems to be the only sort of socioeconomic commitment that prudence will allow into constitutional law. Performance in this field involves complexly designed and coordinated government action in the forms of taxes, transfers, subsidies, and policy instruments affecting markets, industries, families, education, health, internal and external trade, and the monetary system. The choices needing to be made are subtle, technical, interactive, uncertain, subject-to-experience, and endlessly debatable. It is far from clear how courts of law can inject themselves into such matters with much credibility or authority.

So what? Never mind these courts, you might say, under populist persuasion; the point of giving constitutional-legal form and expression to moral intuitions of socioeconomic “rights” is to generate political churn. It is to provide a goad, a platform, and a focus for a continuing political mobilization to press the Rooseveltian vision by popular means, including the vote;<sup>22</sup> and perhaps it is also to make that vision an explicit part of the conscientious legislator’s standard guide to good conduct in office.<sup>23</sup> But, then, are you confusing constitutional law with Sunsteinian constitutive commitment? Without a boost from a political-cultural condition of constitutive commitment, how can you hope to achieve the reform of constitutional law you say you seek? Once you have the constitutive commitment in hand, what further support for continuing political mobilization can you want?

How, after all, do you inject welfare-state norms into constitutional law when they are not already there? One way is the “juristocratic” way: judges reading the norms into a doctrinal corpus that does not self-evidently contain them.<sup>24</sup> That can happen, although not, perhaps, exactly according to the taste

<sup>22</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (Oxford Univ. Press 2004).

<sup>23</sup> See Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585 (1975).

<sup>24</sup> “Juristocracy” appears to be coinage of Ran Hirschl. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (Harvard Univ. Press 2004). On the point of non-self-evidence in the U.S. case, the most telling testimony comes from two egalitarian liberals: Cass Sunstein, who pleads constitutive commitment in lieu of constitutional law, and Ronald Dworkin, who denies that even Judge Hercules can find socioeconomic guarantees in American constitutional law, while “wishing” for moral reasons that the case were otherwise. See RONALD DWORKIN, *FREEDOM’S LAW* 36 (Harvard Univ. Press 1996).



of popular constitutionalists and not, perhaps, without the kind and degree of support and prodding from society that the notion of constitutive commitment encapsulates.<sup>25</sup> The other way is through express constitutional amendment. Again, however, Americans cannot hope to pass a welfare-state amendment without first accomplishing the political work required to bring national public opinion to the point of a constitutive commitment. In fact, they will have to bring it beyond that point, because, in the United States, constitutional amendment meets with resistance from sources beyond substantive disagreements of ideology and policy. Such sources include both doctrinaire anti-juristocracy (inasmuch as every additional bill-of-rights norm threatens to widen the authority of judges) and doctrinaire “anti-amendmentitis.”<sup>26</sup> Converting a New Dealish constitutive commitment into constitutional law thus requires a major additional push. Speaking strictly from the standpoint of popular constitutionalism, that extra expenditure of effort will be wasted if it succeeds. The new constitutional law, if it could be obtained, would do no more in support of popular mobilization than the constitutive commitment already in hand.

Ah, well, you say, but maybe constitutional law is the will-o'-the-wisp, the pot at the end of the rainbow. Maybe drumming up a sustained campaign for constitutional-legal reform, whether by means of amendment or interpretation, is the best way to build and ignite the constitutive commitment—or the popular, intersubjective awareness of it—that is, after all, the ultimate aim of populist constitutional law.<sup>27</sup> I am happy to grant the point.<sup>28</sup> It offers no answer to my question about why or how, if at all, U.S. constitutional law should be thought the poorer or the worse for its failure to contain a welfare-state amendment or to speak to the question of welfare-state guarantees.

Enter your more judge-centered, instrumental theory. By writing (or reading) welfare-state guarantees into constitutional law, you would engage an influential national institution—the national judiciary—in adjudicative oversight of the adequacy of governmental performance regarding them. Granting that courts are ill-equipped for fine-tuned appraisals of governmental efforts in

<sup>25</sup> See Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8, 9 (2003) (positing and describing “a continuous exchange between constitutional law and constitutional culture”).

<sup>26</sup> See Kathleen M. Sullivan, “Constitutional Amendmentitis,” THE AMERICAN PROSPECT, NOV. 30, 2002.

<sup>27</sup> See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 598 (1986).

<sup>28</sup> For historical documentation, see, for example, Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: the Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006). In the case that Siegel recounts, the process of struggle for explicit amendment wound up producing a “de facto” equivalent, made up of a combination of civil rights legislation and judicialized constitutional interpretation. The question, though, is how much the constitutional-interpretation part adds to the total effect.

this field, does that totally disqualify them from a potentially helpful role? Allowing for the obvious—that “no court can ensure” fulfillment of a socioeconomic commitment—you might still find that worldwide experience suggests that inclusion of socioeconomic commitments in a country’s constitutional law courts may enable courts to “take steps to ensure that basic needs receive a degree of priority, and to correct conspicuous neglect.”<sup>29</sup> Not everyone regards that as a good bet, however. Uncertainty remains high about whether such means are, in general, likely to improve performance. Some think it may depend on whether just the right judicial toolkit and just the right forms of cross-branch interaction have been successfully designed into a country’s constitutional culture and practice.<sup>30</sup>

This is not the place to explore at length the ways in which a constitutionalized socioeconomic guarantee might guide and spur judicial performance in supportive directions that make a real difference. With judicial review in the picture, a New Dealer certainly can find plausible instrumental reasons for wishing a socioeconomic commitment were present in U.S. constitutional law. Those reasons, however, are troubled and contested, and they may not, in the end, be deeply convincing to all whose convictions of morality and policy are strongly welfare statist.<sup>31</sup> As Sunstein writes, “it is hard to show that nations that are relatively more likely to help poor people do so because they have constitutional provisions calling for such help.”<sup>32</sup> It seems in order, then, to ask what further grounds—of political morality, say—one might turn up for judging a body of constitutional law that contains socioeconomic guarantees superior to one that does not. I believe that at least one set of such reasons can be

<sup>29</sup> Sunstein, *American Constitution*, *supra* note 1, at 16. As Sunstein has noted, South African experience offers several possible examples. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221–237 (Oxford Univ. Press 2001). The most recent instance, at this writing, is *Occupiers of 51 Olivia Road v City of Johannesburg*, Case CCT 24/07, [2008] ZACC 1. The Constitutional Court held that § 26 of the Constitution, on the right to housing, “obliges every municipality to engage meaningfully with people who would become homeless” in cases where the municipality exercises its authority (for example) to evict current occupants from housing found to be a danger to them and others. S. AFR. CONST. 1996, § 26(3), provides that no one may be evicted from their home without a court order, and the Constitutional Court held that a court must refuse an eviction order whenever it finds a lack of “meaningful engagement” with the occupants facing homelessness. *Id.* at ¶ 18.

<sup>30</sup> See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (Princeton Univ. Press 2008).

<sup>31</sup> Do not the very same troubles and contestations apply to the First Amendment, and every other cherished clause in the Bill of Rights? They do. See *generally* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton Univ. Press 1999). Their force, however, appears to be greatly enhanced for socioeconomic concerns as compared with the standard liberal freedoms—owing mainly, it seems, to the inevitable open-endedness in verbal formulations of constitutional welfare-state guarantees, and the resulting alternative dangers that they, especially, seem to pose: on the one hand, judicial futility; on the other, judicial overreaching. See *infra*, § 4.2.

<sup>32</sup> Sunstein, *American Constitution*, *supra* note 1, at 16.

identified. With that established, I shall then ask how those who subscribe to the set of reasons I identify might respond to the current state of constitutional law in the United States.

## 2.2. Liberal constitutional morality: The “political” argument

Suppose you find yourself convinced that each of us (who can afford to do so) stands under a strict moral obligation to do something toward alleviating material distress wherever in the country (or wherever in the world) it may be found. The ground of this strict moral duty, you think, lies in the sheer facts of suffering and common humanity. Your conviction gives you strong reason for receptiveness to FDR’s account of the welfare-state responsibilities of Congress. Here is why.

If any of us stands under a moral obligation to contribute toward the relief of others in need, it is—on the view I am just now attributing to you—simply because others, in fact, are in need and we are able to help them. The sustaining cause for belief in the duty to aid is strictly and simply our knowledge that others stand in need that we could help to cure. But that will not suffice to tell us what to do, if we also confess (and will you not?) to believing in some self-serving, equitable limit to the duty. It is, after all, an extremely contentious point, morally, to attribute the entire load of obligation to any or every individual. It is one thing to debate whether you or I stand under a moral duty to take in, overnight, in subzero weather the homeless person who fetches up on our doorstep. It is a very different and hugely more contentious matter to suggest that you or I stand under a moral duty, first, to sell everything we have and, then, to submit ourselves to a lifetime of eighteen-hour days, plying the most remunerative trades we can devise for ourselves, in order to dedicate all of the net proceeds to the task of getting every poor person housed, fed, and vaccinated—all of this regardless of whether others who could be helping out at all.

From acceptance of this point, one cannot pass immediately to negative conclusions about moral claims to welfare-state services or the individual’s moral duties in respect of such claims. The existence of the state, for one thing, blocks the way. As pointed out by Charles Fried and Liam Murphy, among others, there happens to exist among us an agent capable of imposing a distribution among citizens of the burdens of aid. This agent is capable as well—let us assume—of conducting a fair political deliberation on both the scope of the needs and the contours of an equitable distribution.<sup>33</sup> For those who begin with a conviction of the moral obligation resting on each of us to contribute equitably toward the relief of others, just by virtue of our common humanity, it makes perfect sense to claim that the state is morally bound to exercise those capabilities. Or, if that is too metaphysical a view, that citizens are, in any case, morally bound to press the state to do so and to pay, unresistingly, the taxes required for fulfillment of the obligation.

<sup>33</sup> See CHARLES FRIED, *RIGHT AND WRONG* 118–131 (Harvard Univ. Press 1978); LIAM MURPHY, *MORAL DEMANDS IN IDEAL THEORY* (Oxford Univ. Press 2000).

Of course, it is true that each person, acting alone or in voluntary collaboration with others, can try in good faith to define and fulfill his or her individual, equitable obligation to aid the needy, regardless of what others in a position to help may or may not do. But frustration surely awaits whoever makes the attempt,<sup>34</sup> and the argument seems very strong that our efforts along those lines are most effectively and satisfyingly directed toward inducing the state to tax us and others in order to pay for activities along the lines envisioned by FDR.<sup>35</sup>

How far have we come? We see that to speak of prepolitical rights to assistance in meeting basic needs is an order of magnitude more contentious than to speak of prepolitical rights, say, not to be assaulted or defrauded. Arranging outside the state for a fair distribution of correlative burdens seems not to be a troublesome issue with the latter sort of (“negative”) rights, as it is with socioeconomic rights.<sup>36</sup> But still our question remains: What is there in that set of perceptions that makes it even a conditional moral imperative to write a requirement for the state’s activity into constitutional law, over and above uneasy instrumentalist hopes of boosting, thereby, the chances of morally satisfactory governmental performance?

In order to make out a further moral case for the constitutionalization of socioeconomic commitments, you may have to see the state as a part of the problem, not just the solution. You may have to see the state itself—the very fact of its existence, with our support—as a sustaining cause for belief in our obligations to do what we can to make the state something of a welfare state.<sup>37</sup> You may have to embrace a moral argument for socioeconomic rights that is not only “goal based” or “duty-based,” but, in Dworkin’s nomenclature, “right-based.”<sup>38</sup>

The point is this: the moral issues, in this realm, would not and could not exist in just the form they do, were certain basic legal-institutional contingencies not as they are. The least controversial, most widely appealing moral case for giving legal force to socioeconomic rights—say, by including socioeconomic guarantees in a constitutional bill of rights—is one that sidesteps claims about moral rights and obligations as they might arise in conditions of no law

<sup>34</sup> “We may try to live with only the resources we think we would have in a fair society, doing the best we can, with the surplus, to repair injustice through private charity. But since a just distribution [can only be established] through just institutions, we are unable to judge what share of our wealth is fair.” RONALD DWORKIN, *SOVEREIGN VIRTUE* 265–267 (Harvard Univ. Press 2002).

<sup>35</sup> Note this is not to take a position on whether or how far the conduct of the activities thus funded should be centralized, bureaucratized, or kept in the hands of state functionaries.

<sup>36</sup> See MURPHY, *supra* note 33, at 74–75, 94–97.

<sup>37</sup> I take the notion of “sustaining cause” from work of Gerald Gaus. See GERALD F. GAUS, *JUSTIFICATORY LIBERALISM* 19–25 (Oxford Univ. Press 1996).

<sup>38</sup> See DWORKIN, *supra* note 21.

at all or a so-called state of nature. In this respect, socioeconomic rights appear to differ from legal rights protecting against assault, fraud, and the like. Debates over the morally proper scope of such garden-variety legal rights typically reach back to prelegal moral rights and obligations as the source of a demand upon lawmakers to do the correspondingly right thing in the arena of law. The most widely commanding moral case for installing socioeconomic rights in a country's laws—what we may call the “political” case—does not proceed in that way. It bypasses speculation about a moral duty to aid others rooted solely in the facts of suffering and common humanity, anchoring itself, instead, in the historical contingency that law exists in the country. It rests on the facts of social cooperation that take the form of legal ordering, and on the demands for general compliance with the laws that a legally ordered society directs toward everyone. Adding this political-moral argument to the argument based on our common humanity (which the political view does not challenge or displace) can only strengthen the background moral case for welfare-state activity. There is no apparent reason why adding in the political case should repel anyone who stands already convinced without it. The political view is not, after all, the view that morally warranted regard for others' needs flows “entirely” from “concerns with legitimate governance.”<sup>39</sup> It is only the view that such regard does flow from such concerns.

All legal systems are, at bottom, practices of social cooperation, dependent for their survival on the persistence in society of a general compliance with the laws and legal interpretations that issue from those practices.<sup>40</sup> Thus, they all present—at least to broadly liberal sensibilities—the question of political justification or legitimacy, the need to supply a moral warrant for the demands for general compliance with laws produced by divided votes, directed to individual members of a population of presumptively free and equal persons. In the “political-liberal” formulation of John Rawls, such demands are justified when, and only when, the laws in question issue from a general lawmaking system—a constitutional regime—that everyone who is both rationally self-interested and socially reasonable may be expected to endorse.<sup>41</sup>

On this view, general political legitimacy depends on what we may call a “legitimation-worthy” constitution.<sup>42</sup> To judge a constitution legitimation-worthy is to find that its prescriptions, taken as a whole so as to constitute a

<sup>39</sup> Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 273, 277 (1998).

<sup>40</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 240 (Harvard Univ. Press 1971) (discussing “Hobbes's thesis”).

<sup>41</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 137, 217 (Columbia Univ. Press, paper ed. 1996) (presenting the “liberal principle of legitimacy”).

<sup>42</sup> I have adapted the next few paragraphs from my *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, TULSA L. REV., (2008). See also Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 101–109, 115–121 (2003); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1 (2003).

unified political system, have a special kind of virtue or merit. Namely, they cast a mantle of moral justification over the enforcement against everyone of approximately all of the laws, rulings, and decrees that issue in compliance with the system they constitute. The aim is thus a constitution whose terms are such that they allow you or me to say, with a clear conscience, that any law whose process of enactment and whose content pass muster under the constitution's requirements can ipso facto be deemed a law with which all within range have good enough reason to comply, and which we, therefore, are justified in enforcing.

A legitimation-worthy constitution thus does important moral work. It allows for a kind of proceduralization of judgments regarding the moral permissibility of collaboration in the enforcement of laws of possibly uncertain or disputed moral merits. Instead of asking whether the contested law is good or bad or right or wrong in substance—a question that seems bound to land us in obdurate division in too many cases—one asks whether it is “constitutional,” a technical and a procedural question. If the answer is yes, those who enforce the law are deemed justified in doing so, no matter (within limits) how morally or otherwise deficient anyone, possibly including the enforcers, may find that law to be. Judgments regarding the legitimacy—meaning the morally justified enforceability—of laws are in this way proceduralized. The burden of justification is displaced from the law in question to the legally constituted political system whence it issued. Thus, what a legitimation-worthy constitution gives us, if we have one, is not just a procedure but a procedure imbued with a special virtue. It gives us, to wit, a legitimation procedure.

Of course, not just any constitution that you happen to find in force can be deemed legitimation-worthy just because it is there. And what, then, shall be the test? For Rawlsian liberals—I put this very roughly—the test is that everyone affected, ranking his or her own projects and commitments as no more but also no less deserving of consideration than anyone else's, should be able to accept that constitution as an apt and fair set of governance arrangements for an ethically and otherwise diverse population of free and equal persons whose various aims, hopes, and projects will often come into conflict. In order to meet that test, a lawmaking system must include a commitment—a principle—that affects every topic for which a “rational and reasonable” person would demand one as a condition of willing support for the system as a whole. It may well seem that we cannot fairly call on everyone, when thought of as reasonable but also as rational, to submit their fates to the tender mercies of a democratic-majoritarian lawmaking system without also committing our society, from the start, to running itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation as well as to social and economic life at large.

That, quite arguably, means that social rights guarantees of some kind must compose an essential part not just of the law but of the constitutional law—that is, the publicly acknowledged basic terms of the lawmaking system with



whose outputs everyone is called upon to comply—of any country committed to a more or less liberal political morality. At least in a constitutional democracy such as the United States—where “the order itself” is equated with constitutional law and where constitutional law stands for the political contract<sup>43</sup>—the result of the Rawlsian conception would seem to be the inclusion, morally required, of a socioeconomic commitment in constitutional law. Any expression of the morally requisite systemic commitment will be justifiably suspect if we begrudge it the social form that begets the maximum civic backing the country’s political culture is able to muster. So, evidently, does John Rawls himself conclude.<sup>44</sup>

Cass Sunstein draws a contrast between a typically American, “pragmatic” conception of a constitution’s significance and a typically European, “aspirational” conception. American pragmatists, Sunstein suggests, tend to select principles for constitutionalization that “would be a sensible part of an enforceable constitution containing the important institution of judicial review,” whereas European aspirationalists want their constitutions to “affirm, in principle,” their nations’ “deepest hopes and aspirations.”<sup>45</sup> The Rawlsian view I have described may be said to raise a question about the extent to which Americans retain the full moral freedom to deny the “aspirational” aspect of their constitutional law.

### 3. Sub rosa constitutional norms

A short digression is now required. Our premise so far has been that American constitutional law is, in fact, devoid of socioeconomic guarantees. Not every observer agrees. Lawrence Sager, for one, has developed persuasively a notion of “judicially underenforced” norms in U.S. constitutional law.<sup>46</sup> Sager argues that the refusal of a court to give direct remedial effect to one or another claimed

<sup>43</sup> See Frank I. Michelman, *Living With Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 580–585, 606–611 (2003) (documenting but not unreservedly applauding this fact of American life).

<sup>44</sup> See *id.* RAWLS, *supra* note 41, at 7, 166, 228–229; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 47–48, 129 (Erin Kelly ed., Harvard Univ. Press 2001) (treating provision for a “social minimum” as both a lexically top-ranking principle of justice and a constitutional essential); *id.* at 127–129 (grounding this moral conclusion in considerations of “reciprocity” and “strains of commitment”).

<sup>45</sup> Sunstein, *American Constitution*, *supra* note 1, at 14–15 (distinguishing American constitutional pragmatism from European constitutional aspirationalism).

<sup>46</sup> See, e.g., LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 86–102 (2004) [hereinafter SAGER, *JUSTICE*]; Lawrence Sager, *The Domain of Constitutional Justice*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS*, 235, 240–241 (Larry Alexander ed., Cambridge Univ. Press 1998) [hereinafter Sager, *Domain*]. See also Frank I. Michelman, *The Protective Function of the State in the United States and Europe*, in *EUROPEAN AND US CONSTITUTIONALISM* 131, 143–148 (Georg Nolte ed., Council of European Publishing 2005) (following Sager).



obligation of the state does not necessarily signal the absence—or the court’s belief in the absence—of that obligation from American constitutional law. Why not? Because there may exist sound institutional reasons for judicial abstinence from direct enforcement, and the observance of this reticence does not refute a principle’s subsistence as one having the force of constitutional law for other actors in the legal system to whose conduct it may apply.<sup>47</sup> Neither does it deny such a principle’s binding effect on judges when invoked in some way other than as a ground for direct judicial enforcement. Other ways might include, say, invocation of the principle as a ground of justification for otherwise constitutionally questionable government action. Judicial underenforcement, as Sager deploys the concept, can thus figure as a kind of qualified judicial enforcement. It is decidedly not synonymous with judicial nonrecognition.

The kinds of institutional considerations that may inhibit direct judicial enforcement of certain constitutional norms are well known to constitutional lawyers around the world. There may be lacking a crisp, justiciable standard for deciding questions of compliance and violation. Enforcement may require forms of judicial intervention in public affairs that strain relations between the judiciary and the executive and legislative branches of government; or it may involve the judiciary in making too many subsidiary, managerial decisions that belong properly to the popularly accountable, “political” branches.<sup>48</sup>

All of these problematic institutional ramifications—inherent contestability of standards, strain on interbranch relations, excessive judicial engineering—are likely to be salient when a claimant seeks judicial remedies for a state’s alleged failure to provide assistance or protection that a norm of constitutional law requires the state to provide. The problems recede when the state, having chosen to take assistive or protective action, invokes the constitutional norm in order to justify that action against constitutional complaint. By endorsing the justification, the court neither ignites interbranch controversy (rather the reverse) nor takes on the role of social engineer. And although the exact, constitutional standard of protective obligation may be debatable and remain so, a court upholding government action at least shares with the political branches responsibility for the judgment that the standard is truly engaged by the class of cases the government has targeted by its challenged action.<sup>49</sup>

The theory of judicially underenforced constitutional norms is plausible. Plausible, too, may be an intimation of the presence of welfare-rights strands in the fabric of American constitutional law. No such inference, however, can ever

<sup>47</sup> See *supra*, § 1.2.

<sup>48</sup> See, e.g., Sager, *Domain*, *supra* note 46, at 240.

<sup>49</sup> See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 389 (“For reasons [of] . . . comparative competence[,] . . . courts may rightly hesitate to translate every interest of constitutional magnitude into a [justiciable] constitutional right and may even defer to the judgments of non-judicial officers concerning what the Constitution requires”).

be logically or conceptually guaranteed. Take the case of *Pennell v. San Jose*,<sup>50</sup> in which the Supreme Court upheld against constitutional complaint a city ordinance requiring lessors of housing to absorb a special decrement in rent, when required to accommodate the needs of especially necessitous lessees. That holding might be taken as a sign of a judicially underenforced constitutional right to housing, here given precedence over a credible complaint of invasion of constitutionally recognized rights of property.<sup>51</sup> Need the holding be so construed? May not constitutional law allow the state a license to infringe on certain constitutional rights in response to a certain sort of reason, without necessarily saying that anyone has a right to have the state exercise the license whenever that reason is at hand? When the Supreme Court construes U.S. constitutional law to permit a state to use racial classifications in a certain social context,<sup>52</sup> are we forced to the deduction that U.S. constitutional law obliges every state to follow suit in every comparable context? Must there be no play in the joints?<sup>53</sup>

Some years ago, commentators noticed that the Supreme Court seemed to be assigning exceptional weight to certain classes of human needs in various contexts of constitutional litigation.<sup>54</sup> A chief exhibit was a series of decisions in which the Court found that a constitutionally guaranteed “right to travel” bars American states from excluding recent entrants from access to state-provided subsistence allowances<sup>55</sup> and emergency medical services<sup>56</sup> but not from reduced-price college education<sup>57</sup> or the state’s divorce courts.<sup>58</sup> What was the “source,” we wondered, for the “moral scale” by which the Court measured the acceptability of different exclusions?<sup>59</sup> Must it not be constitutional law? And

<sup>50</sup> *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

<sup>51</sup> See *id.*, at 15 (Scalia, J., concurring in part and dissenting in part).

<sup>52</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (permitting limited consideration of race in selection among applicants for entrance to law school, in deference to the state’s interest in student body diversity).

<sup>53</sup> For another instance of what we might call optional detection of a sub rosa socioeconomic commitment in U.S. constitutional law, see Laurence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Services*, 90 HARV. L. REV. 1065 (1977); Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977). Both the cited articles found signs of a constitutionalized socioeconomic commitment in an ostensibly federalism-based decision holding state and city governments immune from national-government wage and hour regulations.

<sup>54</sup> See, e.g., Michelman, *Welfare Rights*, *supra* note 7, at 660–664; SAGER, JUSTICE, *supra* note 46, at 98.

<sup>55</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>56</sup> See *Memorial Hosp. v. Maricopa County*, 415 U.S. 985 (1971).

<sup>57</sup> See *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff’d*, 401 U.S. 985 (1971).

<sup>58</sup> See *Sosna v. Iowa*, 419 U.S. 393 (1975).

<sup>59</sup> Michelman, *Welfare Rights*, *supra* note 7, at 690.

did there not emerge from these cases, then, “the categorical notion of a constitutional right to be provided, in case of need, with ‘the basic necessities of life?’”<sup>60</sup>

Well, no. At least not necessarily. Perhaps what emerges is exactly what the Court said: not a social-democratic (“redistributive”) norm but a libertarian norm bestowing a right to change one’s state of residence without risk of excessive “penalty” for doing so. No doubt, the only proper source for the moral scale on which excessiveness of penalty is measured in constitutional litigation is constitutional law; we were right about that. We had found in constitutional law a clear confirmation that targeted exclusion from whatever emergency treatment centers the state may be maintaining is an unconscionable impediment to freedom of movement. That, however, is a very different matter, with a very different ideological spin and casting a very different sort of shadow over the conduct of civic affairs, from finding in constitutional law a mandate upon the state to operate an emergency treatment center in every locality, free of charge for those in financial straits.

## 4. Explaining America Away

### 4.1. Denial

I cite the underenforced-norms thesis not for its possible truth but as one among several phenomena that might be collected under the heading “explaining America away.”

Suppose that, on Rawlsian or other grounds, you are inclined to endorse as true the following proposition:

In prosperous constitutional democracies, where a body of national constitutional law binds ordinary lawmaking, sound moral reasons ideally call for inclusion of socioeconomic commitments in that body of constitutional law.<sup>61</sup>

And then you observe, with respect to some prominent, prosperous constitutional democracy, that this country’s constitutional law is apparently devoid of socioeconomic commitments. Of course, the country I have in mind is the United States.

The apparent rejection of socioeconomic commitments from U.S. constitutional law might make you squirm a bit. If you are American, you may not like to find yourself in the position of branding as morally egregious the constitutional law of your own country—not to mention the moral dispositions of the mass of your fellow citizens (insofar as you take U.S. constitutional law as an

<sup>60</sup> *Id.* (quoting from Memorial Hospital, *supra* note 53, at 259).

<sup>61</sup> There may be some countries properly classifiable as constitutional democracies where national constitutional law of that kind (that is, the kind that binds ordinary lawmaking) does not exist, and to whose affairs, therefore, the proposition in question has no application.

approximately true expression of the prevalent, current values of the American people as a whole). For that matter, whether you are American or not, the appearance of a decidedly rejectionist stance in U.S. constitutional law might also make you anxious about your own moral certainties. The combination of these effects might even prompt an impulse toward denial of the fact of rejection that seems so plain to most lawyers.

“In denial” might, indeed, be one testy way to describe the outbreaks we see of suggestions that socioeconomic rights actually do have—right now, today—a foothold in American constitutional sensibilities (hence, the idea of Roosevelt’s second bill as a constitutive commitment of American society) or even have a foothold in U.S. constitutional law proper as, for example, a judicially underenforced constitutional norm.<sup>62</sup> If you were anxious to get the American people off the hook for a display of bad morals, the idea of constitutive commitments would come in handy. If you were anxious about getting the American polity off the hook for setting a bad moral example to the world, the idea of judicially underenforced constitutional norms would come in equally handy. Of course, this is not to say that either of these ideas is false or mistaken as applied to the American case. Either or both may be true. But neither of these ideas quite gets at what may be, I think, the most incisive way to explain America away—to explain, that is, how the current U.S. position need not be construed either as a normative repudiation or as an evidentiary impeachment of the “sound moral reasons” claim to which I am now assuming you are attached. The more promising escape route does cross paths with the thesis of judicial underenforcement.<sup>63</sup> It differs, however, from the latter by spurning denial altogether and frankly choosing confess-and-avoid as the form of its plea.

#### 4.2. Nonideal constitutional morality

The key is the word “ideally.”<sup>64</sup> Spare me your groans. This will be no Clintonian quibble. On that word “ideally” hangs a serious moral argument, to the effect that sound moral reasons do not currently call for a constitutionalization of socioeconomic commitments in the U.S. Owing to the prevalence here of certain nonideal conditions, it may be argued, the morally superior course may be to pursue the Rooseveltian vision by means that do not involve constitutional law.

To be worth much in practice, moral argument must be capable of providing guidance for real-life choices. The choices that morality calls for “ideally,” in some highly tractable world we might imagine, morality might reject in a different, less accommodating world that we actually confront. One can make

<sup>62</sup> See *supra*, §§ 1.1, 3.

<sup>63</sup> It is also a close cousin of the “institutional” or “pragmatic” explanation for the American omission, proposed by Cass Sunstein. See Sunstein, *American Constitution*, *supra* note 1, at 14–16.

<sup>64</sup> Recall the proposition, given above: “In prosperous constitutional democracies, where a body of national constitutional law binds ordinary lawmaking, sound moral reasons ideally call for inclusion of socioeconomic commitments in that body of constitutional law.”

some progress by asking whether that might be the situation, here, with regard to the current rejection of socioeconomic commitments by—in particular—U.S. constitutional law.

That cannot be our situation unless there is some respect in which actual conditions in the U.S. deviate from those that are assumed by the ideal moral case for including socioeconomic commitments in constitutional law. In order to identify any such deviation, we need some definite content for the categories of ideal and nonideal “conditions.” (It is not, after all, that the U.S. faces some special difficulty in affording New Dealish programs.) Taking my cue from John Rawls, I shall say that conditions are “ideal,” for purposes of constructing arguments regarding political morality, when the following conditions hold true:

- (1) Sound moral reasons, once publicly brought to light, are recognized as such by relevant actors.
- (2) The actors strive to make their actions comply with what the publicly recognized, sound moral reasons require.
- (3) This fact of compliance will be accurately detected by concerned observers. (In other words, there will be no lingering, divisive disagreement about whether choices actually made truly comport with what the publicly recognized, sound moral argument permits or requires in the circumstances.)<sup>65</sup>

Moral ideal theory seeks out principles for use where these conditions hold. Nonideal theory is concerned with morally best choices when one or more of them does not hold. The idea is that we can best learn what we want to know by seeking, first, to determine what morality “ideally” requires in the way of constitutional choices, meaning what morality would require assuming that the correct choices, once brought to light by competent moral argument, will effectively govern the conduct, perceptions, and appraisals of relevant actors. We then use these conclusions from ideal theory to help us decide which choices would be morally preferred when the assumptions of ideal theory appear not to be true in the actual world with which we have to deal. We must allow that the morally preferred choice may then differ from the morally correct choice under ideal conditions.<sup>66</sup>

<sup>65</sup> These stipulations loosely follow John Rawls’s conception of “ideal, or “strict compliance” political-moral theory. “Strict compliance,” Rawls writes, “means that (nearly) everyone strictly complies with ... the principles of justice. We ask in effect what a perfectly just, or nearly just, constitutional regime might be like, and whether it may come about and be made stable ... under realistic, though reasonably favorable, conditions. In this way, justice as fairness ... probes the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realization of its appropriate political values—democratic perfection, if you like.” Ideal theorizing is in order, Rawls suggests, when addressing disagreements about “what conception of justice is most appropriate for a democratic society under reasonably favorable conditions.” RAWLS, *supra* note 44, at 13.

<sup>66</sup> To avoid misunderstanding: Ideal theory may be addressed to worlds in which facts of disagreement or “pluralism” are assumed to be among the inevitable circumstances of justice, along with

The Rawlsian conclusion in favor of basic-needs assurances as a constitutional essential is a product of ideal-theoretic argument and, as such, is not guaranteed to hold true for cases in which the convergence-of-opinion conditions of ideal theory do not obtain. Consider, then, the case of the United States today. It may be debatable whether most Americans today would affirm a moral claim on the part of every citizen to have the American state exert its best efforts to assure everyone's access—through work, family, or other channels—to adequate levels of subsistence, housing, health care, education, and safety. Let us, however, assume that most would. Recall that “best” efforts must take due account of other high-ranking principles and goals in a country's political morality. Observe that, in the U.S. today, those other principles and goals doubtless include personal liberty and independence, the rule of formally realizable law, and general economic prosperity. Bearing these points in mind, can we also expect anything approaching a convergence of respectable American opinion about which courses of action open to government at any given time will and will not truly comport with the complex demands of a “best efforts” obligation? (What fraction, for example, would insist on “tough love” and a free market as the right solution?)

That question is rhetorical, of course, and I expect almost every reader will nod agreement to its implication of deep and obdurate division within American opinion regarding government policy in the socioeconomic field. Of course, such division by itself cannot justify, morally, an omission of socioeconomic assurances from U.S. constitutional law in the eyes of anyone who considers such an omission morally insupportable under ideal conditions. The division might rather point to inexcusable disarray in American public opinion. The undoubted existence of that division, however, opens the door to a possible argument to the effect that our constitutional law is morally in order, at least for the moment—given one further fact about American society.

That further fact is our currently entrenched reliance on judicial review as an indispensable guarantor of the rule of constitutional law, of the constitutional contract.<sup>67</sup> This is not on its face a fact that falls under the heading of a Rawlsian nonideal condition.<sup>68</sup> Nevertheless, it works as a “but for” cause of a

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other social facts such as moderate scarcity. Principles and constraints of toleration, neutrality, and public reason will then very likely form a part of the resulting conception of justice. What is “ideal” about ideal theory is that it chooses and defends such principles of justice for a pluralistic (disagreeing) society on the assumption that, once publicly brought to light, the chosen principles (of toleration and so on) will be commonly recognized, understood, accepted, and loyally followed.

<sup>67</sup> Compare DWORKIN, *supra* note 24, at 33–35 (relying, in part, on historical entrenchment of judicial review in American practice for a defense of judicial review in the U.S. today); KRAMER, *supra* note 22, at 7–8, 227–233. Kramer calls this fact a “modern understanding” and maintains that its vintage is “recent,” but he does not deny it; to the contrary, he decries it.

<sup>68</sup> Rawls is open to the defensibility of judicial review as a component of a legitimation-worthy constitutional regime. See RAWLS, *supra* note 41, at 240.



morally significant, standard worry (as we shall call it) about writing or reading socioeconomic commitments into our constitutional law. It is true, as will be seen, that the predictable persistence of unquenchable controversy over whether government is at any moment doing what is required to honor a constitutionalized socioeconomic commitment is also a but-for cause of the standard worry. My point, though, will be that without the American habit of dependence on judicial review as a guarantor of constitutional legality, the standard worry would not arise, or would be baseless if it did.

In a country like the United States, given both our embrace of popular government and the irreducible uncertainty, contestability, and contingency affecting choices in the field of socioeconomic policy, any constitutionalized socioeconomic commitment inevitably must be couched in abstract, best-efforts terms, South African style.<sup>69</sup> But the American culture and practice of judicial review do not fit comfortably with the seemingly boundless, practical indeterminacy of a commitment thus abstractly couched. By constitutionalizing socioeconomic rights in such a form, the standard worry runs, you would force the American judiciary, and especially the Supreme Court, into a hapless choice between usurpation and abdication, from which there would be no escape without either embarrassment or discreditation.<sup>70</sup> Down one path, it seems, lies the judicial choice to issue concrete, positive enforcement orders in a pretentious, inept, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against the prevailing political will. Down the other lies the judicial choice to debase dangerously the entire currency of rights and the rule of law—the spectacle of courts openly ceding to executive and legislative bodies a nonreviewable privilege of indefinite postponement of a declared constitutional right. In sum, a formal act of writing or reading socioeconomic assurances into constitutional law would run risks of serious damage to the integrity (and to public confidence therein) of the country's practices of constitutionalism, of law and legality, and of democracy, upon which political legitimacy depends. So goes the standard worry.

The worry is credible, in some degree.<sup>71</sup> It envisions risks with which political morality (not just political prudence) has good reason to be concerned—a point I do not belabor here, but which I hope is obvious. More to our purpose is that

<sup>69</sup> See *supra*, § 1.3.

<sup>70</sup> See, e.g., Sunstein, *American Constitution*, *supra* note 1, at 15–16 (offering the standard worry as a partial, but by itself insufficient, explanation of the American omission).

<sup>71</sup> As stated in the text, the standard worry fails to take account of recent investigations of the ways in which reviewing courts, employing so-called weak remedies, can hope to respond usefully to complaints regarding performance by governments of best-efforts-style socioeconomic commitments while avoiding both abdication and usurpation. See, e.g., TUSHNET, *supra* note 30. How far these methods might be available to American courts, under our prevailing remedial doctrines and understandings, is an interesting question that lies beyond the scope of this essay. For the sake of clarity, the analysis here simply assumes that the choice is between total judicial abstinence and seriously intrusive judicial remedies.



these are all risks that cannot possibly arise under the opinion-convergence assumptions of ideal theory. The risks all presuppose an obduracy and intensity of disagreement between the judiciary and at least some other civic actors about what morality and the Constitution require of government and whether government is currently conducting itself in conformity to those requirements. No such disagreement can arise where everyone is assumed always to recognize compelling moral reasons, once those have publicly been brought to light, and to gauge accurately the best-efforts compliance of others with what those reasons require in a given situation. Bearing this point in mind, we can see how the existence of nonideal conditions in the U.S. might enable an argument that the morally preferable course there, all things considered, is to exclude socioeconomic commitments from constitutional law, although ideally they must be included.

Something more will be needed, though. The argument for the situated moral wisdom of leaving our constitutional law as it stands depends on a perception of the moral risks engendered by drawing the judiciary into confrontations with the government over the government's performance of claimed socioeconomic commitments. The risks in question are ones that can arise only where judicial constitutional review really does serve as a linchpin of constitutional legality, as it does currently in the United States. Completion of the argument for the defensibility of the American omission under nonideal public-epistemic conditions thus depends on American political culture's current penchant for judicial review.

The standard worry, with its attendant suggestion of moral risk, depends on the view that a norm cannot be constitutional law, cannot count as constitutional law, without being turned over, lock, stock, and barrel, to judges for enforcement. It was in anticipation of this turn in the analysis that I insisted, in section 1.2, on a conception of a right's existence in law that did not necessarily posit, à la Holmes, a judicial remedy for violation. For suppose we thought that Americans, by and large, accepted the more minimal view I offered there of what it means for a right to exist in law—roughly, that those who inexcusably act in violation of the right thereby expose themselves to the special sort of public blame or censure that we would typically direct toward lawbreakers. The moral-risk objection to writing socioeconomic commitments into U.S. constitutional law would then collapse. In that case, we should feel perfectly free to write socioeconomic commitments into our constitutional law, while at the same time directing courts to get lost when controversies raged over the sufficiency of the government's performance of such commitments.

One might draw the following conclusion: Americans who believe that sound moral reasons ideally require the inclusion of socioeconomic commitments in constitutional law should see it as their moral obligation to do their best to persuade Americans at large of the gap between a norm's being law and its being available for judicial enforcement and, given the existence of this gap, of the perfect prudence of writing certain norms into constitutional law while directing a hands-off judicial policy respecting performance of those norms.

But even that proposition is not free of doubt. Burke must have his say. In any political culture, at any given time, there may be structures of belief on which confidence in the rule of law, legitimacy—call it what you will—depends and which cannot be torn down with any degree of confidence about the consequences. The less certain you are about all that, the more receptive you may be to a claim that there are sound moral reasons—in these United States—to settle for a New Deal constitutive commitment, if we have it or can obtain it, and to leave constitutional law alone.

With that question hanging (I do not propose to answer it), we can see how a respectable, moral case for the exclusion of socioeconomic assurances from U.S. constitutional law might possibly trump an ideal-theoretic case for their inclusion. We can also see how the situation may be, to some degree, special to the United States. If we thought it would be a safe and simple matter here—as it very well might be in many or most other countries—to write a socioeconomic commitment into constitutional law but instruct the judiciary to leave compliance judgments to purely political forums, the undoubted existence of nonideal conditions would do nothing to impeach the ideal-theoretic case for inclusion (although, of course, it might fatally complicate the politics of getting it done).

For suppose we did have a clear and widely shared understanding, here, that a norm can be placed off limits to judicial enforcement without impeaching its status as law that counts as such. The Rawlsian case we reviewed in section 2.2 would then certainly call for inclusion in American constitutional law of an abstractly framed, best-efforts commitment to the satisfaction of everyone's basic needs. So what if the commitment would have to be so abstractly couched as to become a field for endless political debate? That matters of the deepest political-moral import should be found endlessly debatable in a democracy cannot itself be counted a danger to legitimacy, without dooming the chances for legitimacy in any modern, plural society.<sup>72</sup>

The analysis I have just completed adds up to this: Assuming that inclusion of socioeconomic rights in constitutional law is morally required under ideal conditions of opinion-convergence, with or without judicial review also being a part of the constitution, moral reasoning under non-ideal conditions arguably may favor exclusion, but only if judicial review occupies a certain, special place in the society's legal culture. Where the latter condition is absent, an ideal-theoretic moral conclusion in favor of a constitutionalized socioeconomic commitment would hold even under nonideal conditions.

Thus it can be argued. Suppose you accepted the argument. Would it leave you with a new moral ground for objection to judicial review?<sup>73</sup> Morally based objections to judicial review usually complain of the removal of decision-making

<sup>72</sup> For elaboration of this point, see Frank I. Michelman, *The constitution, social rights, and liberal political justification*, 1 INT'L J. CONST. L.(I•CON) 13, 25–30, 33–34 (2003).

<sup>73</sup> Not new in the sense of never before suggested. See, e.g., Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006).

authority from those who morally ought to have it.<sup>74</sup> The argument presented here suggests the possibility of a different sort of moral complaint. The complaint would be that overdependence on judicial review can ground a situationally valid, moral objection to putting into your constitutional law something that moral ideal theory tells you should be there. The overdependence thus provides moral cover for a choice that moral ideal theory condemns. Is that a moral cost to be chalked up against the argument for judicial review? It would not necessarily be decisive, any more than judicial review, at this stage of our history, is purely a matter of choice.

<sup>74</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2007).